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ORIGINAL

February 16, 2000

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NOTICE OF EX PARTE PRESENTATION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

Re: *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas, CC Docket No. 00-4.*

Dear Ms. Salas:

Please be advised that in the meeting with FCC staff as described in my February 10 ex parte letter (copy attached), staff requested a copy of the attached letter be filed in this proceeding.

In accordance with the Commission's rules, an original and one copy of this notification are submitted herewith.

Sincerely,

CC: Mr. Atkinson
Ms. Matthey
Mr. Dale

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February 10, 2000

NOTICE OF EX PARTE PRESENTATION

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
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Re: *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas, CC Dkt. No. 00-4.*

Dear Ms. Salas:

Please be advised that on Thursday, February 10, 1999, Marian Dyer, Paul Mancini, Martin Grambow, and Sherry Ramsey, of SBC Communications, Inc. and Lincoln Brown, Jeff Weber, and Keith Epstein of SBC Advanced Solutions Inc. (ASI) met with the following individuals of the Common Carrier Bureau: Carol Matthey, Bob Atkinson, Ken Moran, Anthony Dale, Hugh Boyle, Mark Stephens, Sherry Herauf, Pete Young, Bill Hill, Mark Stone, Bill Dever, Jake Jennings, Jessica Rosenworcel, Margaret Egger, Johanna Mikes, and Don Stockdale. Also attending were Radhika Karmarkar and Frank Lamancusa of the Enforcement Bureau. The purpose of the meeting was to discuss conversion and operational activities of SBC's advanced services affiliate (ASI), to wit: collocation and order processing. Attached are the handouts used during the meeting.

In the course of the discussion, reference was made to Mr. Brown's affidavit in the above referenced proceeding regarding ASI's plans to be operational in Texas. Hence, an ex parte is being filed in this proceeding.

In accordance with the Commission's rules, an original and one copy of this notification are submitted herewith.

Sincerely,

A handwritten signature in cursive script, reading "Marian Dyer".

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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February 15, 2000

Carol E. Matthey
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Room 5C-451
Washington, D.C. 20554

RE: *In the Matter of Applications for Consent to the Transfer of Control of
Licenses and Section 214 Authorizations from Ameritech Corporation,
Transferor, to SBC Communications Inc., Transferee, CC Dkt. No. 98-141*

Dear Ms. Matthey:

I understand that two issues have arisen concerning SBC's compliance with the commitments that SBC made in order to obtain approval of the transfer of licenses and lines in this matter. Both issues involve the transitional mechanisms for a separate affiliate for advanced services set forth in subparagraphs I(3)(c)(3), I(4)(n), and I(6)(g) of the merger conditions. Specifically, the Commission's staff has raised questions concerning the role of the SBC ILECs in (1) arranging for virtual collocation by the separate advanced services affiliate, and (2) in processing the affiliate's customer orders for advanced services.

SBC has asked me to analyze both issues in order to determine whether they are in full compliance with the merger conditions. Based on the facts as explained to me by SBC, and as set forth in this letter, I conclude that SBC is acting in accordance with the merger conditions on both issues. Under the plainly stated terms of subparagraphs I(3)(c)(3) and I(4)(n), the SBC ILECs are authorized to arrange collocation space and process orders for advanced services during the 180-day transitional period to a fully separate advanced services affiliate. Subparagraph I(6)(g) cannot properly be read to override that authority. The reasons for that conclusion are set forth below.

Carol E. Matthey
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Background

The SBC/Ameritech merger closed on October 8, 1999. Pursuant to paragraph I(1) of the merger conditions, SBC was required to establish advanced services affiliates prior to the merger closing date. It did so on October 5, 1999. The name of the affiliate established to provide advanced services in the SWBT, Pacific Bell, SNET, and Nevada Bell territories is SBC Advanced Solutions Inc. ("ASI").

As required by the merger conditions, ASI has negotiated interconnection agreements with the SBC ILECs and filed those agreements for approval by the appropriate state commissions. ASI has also filed any tariffs necessary for ASI to provide advanced services and has filed for any required state certifications (for intrastate services). Under subparagraphs I(6)(b) and I(6)(d) of the merger conditions, ASI is required to provide new activations of advanced services no later than 30 days after all necessary approvals have been obtained in a given State.¹ Prior to that dates in a given State, SBC is permitted to provide new activations through SBC ILECs in the manner set forth in subparagraph I(6)(g).

There are two other relevant transitional mechanisms in the merger conditions, both of which last for 180 days after the merger closing date (i.e., until April 5, 2000). There is a general transitional authority contained in subparagraph I(3)(c)(3), which allows the SBC ILECs to provide to ASI, under a written agreement, "network planning, engineering, design, and assignment services for Advanced Services Equipment . . . (including the creation and maintenance of customer records)."² There is also a more specific articulation of the transitional mechanisms in subparagraph I(4)(n). The purpose of these transitional mechanisms, as stated in subparagraph I(4)(n) is "to minimize any disruption to the efficient and timely delivery of Advanced Services to customers."

¹ The rules are slightly different for advanced services customers that are providers of Internet services, I(6)(b), than for other advanced services customers, I(6)(d). But those distinctions are not relevant to the analysis here.

² Under subparagraph I(3)(d), the SBC ILECs may continue to provide these functions to ASI on an exclusive basis for ADSL, even beyond the 180-day period, until line sharing is provided to unaffiliated providers of advanced services within the same geographic area, provided the SBC LECs provide those unaffiliated providers the Discounted Surrogate Line Sharing Charges set forth in Part II of the merger conditions.

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Analysis

Each of the three relevant transitional mechanisms set forth in the merger conditions — I(3)(c)(3), I(4)(n) and I(6)(g) — is a permissive provision. Each allows the SBC ILECs to provision Advanced Services in certain ways that will be forbidden once the relevant transitional period expires. The permission granted in subparagraphs I(3)(c)(3) and I(4)(n), relating to exclusive, integrated operations by ASI and the SBC ILECs, is broader than the permission granted in subparagraph I(6)(g), which relates to ASI's assumption of customer accounts. But subparagraph I(6)(g) does not in any respect limit or restrict the permission granted in those other provisions. Thus, if something is permitted under subparagraphs I(3)(c)(3) and I(4)(n), it does not matter whether or not it would be separately permitted under subparagraph I(6)(g). Subparagraphs I(3)(c)(3) and I(4)(n) plainly permit the SBC ILECs — during the 180-day transitional period — to arrange collocation and process orders for ASI. Subparagraph I(6)(g) does not purport to, and does not in fact, withdraw that authorization.

1. **Collocation.** As noted, subparagraph I(3)(c)(3) expressly allows the SBC ILECs to provide to ASI, under a written agreement, "network planning, engineering, design, and assignment services for Advanced Services Equipment." This authority lasts "for a period of not more than 180 days after the Merger Closing Date." "After 180 days, the separate affiliate shall not obtain such services from any SBC/Ameritech incumbent LEC."

This authority is repeated in subparagraph I(4)(n)(4), which states that "[p]ursuant to the provisions of Subparagraph 3c, the incumbent LEC may, on an exclusive basis, provide network planning, engineering, design and assignment services for Advanced Services Equipment . . . to the separate Advanced Services affiliate for a period of no more than 180 days after the Merger Closing Date."

These two authorizations are unequivocal. The SBC ILECs have an absolute right, for 180 days after the Merger Closing Date, to provide, *inter alia*, network planning and engineering functions related to ASI "on an exclusive basis." It is also unequivocal — because the merger conditions expressly define the terms in subparagraph I(4)(a) — that the relevant "network planning and engineering functions" include "[a]rranging and negotiating for collocation space."

Paragraph I(4) notes that "[a]fter a transition period (as defined in Subparagraph 4n below), all Advanced Services offered by SBC/Ameritech in the SBC/Ameritech Service Area will be provisioned in accordance with the terms of this Paragraph" (emphasis added). Paragraph I(4) then articulates the requirements of this "steady-state" provisioning of advanced services. It notes in subparagraph I(4)(a) that, once the transitional period is completed, "network planning and engineering functions related to Advanced Services that are the responsibility of the separate

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Advanced Services affiliate . . . may not be performed by the incumbent LEC." Subparagraph I(4)(a) defines these network planning and engineering functions to include "[a]rranging and negotiating for collocation space with the incumbent LEC under the same terms and conditions, and utilizing the processes that are made available to unaffiliated telecommunications carriers, and arranging for any new Advanced Services Equipment to be delivered."

Subparagraph I(4)(n) then expressly states that these very network planning and engineering functions — which must be provided by the advanced services affiliate *after* the 180 day transitional period (*but see* n.2, *supra*) — may be provided by the incumbent LEC, on an exclusive basis, *during* that transitional period. The conclusion is inescapable that the SBC ILECs can arrange collocation for ASI on an exclusive basis for 180 days following the merger closing, using "exclusive" processes that are not available to CLECs. Indeed, it is impossible to read these provisions in any other way. The authority is clear and express. It has a definite beginning (the merger closing date) and a definite end (180 days later).

Notwithstanding subparagraphs I(3)(c)(3) and I(4)(n), my understanding is that some staff members have suggested that subparagraph I(6)(g) precluded the SBC ILECs from arranging collocation for ASI in a given State starting on the day the merger conditions became effective.³ They suggest that ASI should immediately have started submitting collocation requests -- even for equipment that had already been ordered by the SBC ILECs and that was scheduled to be installed by the SBC ILECs during the transition period in space that had already been assigned and/or arranged by the SBC ILECs. This would effectively have meant that all collocation activities by the SBC ILECs for ASI would have ceased during the transition period since it takes from four to six months for the SBC ILECs to process and complete such requests. Given the priority that the Commission and SBC placed on the timely and rapid deployment of advanced services, such a result would never have been proposed or agreed to by SBC or by the Commission. Nor is any such requirement to be found in the merger conditions.

Two things must be said about subparagraph I(6)(g). *First*, it does not mention collocation. The term is simply not to be found there. Subparagraph I(6)(g) discusses joint marketing and it discusses specific customer orders for service (other than orders for ADSL service that uses Interim Line Sharing). But nowhere does it mention collocation. Nowhere

³ Other staff members, attempting to soften the consequences of this reading, have apparently suggested that ASI only needs to arrange for collocation starting 30 days after ASI has received all the necessary approvals in that State. But subparagraph I(6)(g) does not, as this view would suggest, kick in 30 days after ASI has received necessary approvals in a given State. That is when it *expires*. Subparagraph I(6)(g) applies "until such time" as the separate affiliate is required to provide new activations, not after such time.

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either in subparagraph I(6)(g), or anywhere else in the merger conditions, is there a provision that requires ASI to file collocation requests during the transitional period.

Subparagraph I(6)(g) does indicate that it permits SBC/Ameritech to provision advanced services in a manner that is "intended to be the 'functional equivalent' of provisioning service through a separate Advanced Services affiliate." But then it goes on to articulate what that means, and it does not mention collocation. The Commission cannot bootstrap a vague aspiration for "functional equivalency" into a specific requirement that collocation be arranged by ASI; particularly not in the teeth of two separate provisions that expressly permit the SBC ILECs to arrange collocation for ASI.

Second, and even more importantly, subparagraph I(6)(g) is a permissive provision. It says that, during the particular transitional period set forth in that provision, SBC/Ameritech "shall be permitted" to provision advanced services in the manner set forth in that subparagraph. It doesn't require SBC/Ameritech to do anything. It is an exception to otherwise applicable restrictions.⁴

As a matter of "legislative history," it is clear that subparagraph I(6)(g) was originally the only transitional authority granted to SBC/Ameritech.⁵ That authority, however, was too restrictive and would have seriously disrupted SBC/Ameritech's ability to deliver advanced services to consumers immediately after the merger. Therefore, in order "to minimize any

⁴ To be sure, subparagraphs I(6)(g)(2), (3), and (4) use mandatory terms: "must be passed," "shall order," and "shall be passed," respectively. These are all parts of what SBC/Ameritech must do *if* it wants to avail itself of the transitional authority granted in subparagraph I(6)(g). But SBC/Ameritech is not *required* to avail itself of that authority. That is something that SBC/Ameritech "shall be permitted" to do. But it is not necessary for SBC/Ameritech to do so, particularly because the transitional authority in subparagraphs I(3)(c)(3) and I(4)(n) is so much broader and more inclusive.

⁵ The predecessor of subparagraph I(6)(g) was subparagraph 31(f) of the original July 1, 1999 draft of the proposed conditions. Letter from Paul Mancini and Richard Hetke to Magalie Roman Salas (July 1, 1999) (attaching proposed conditions). That early version did not contain any counterpart to either subparagraph I(3)(c)(3) or subparagraph I(4)(n) of the final merger conditions. Those two subparagraphs, with their 180-day transitional mechanisms, were added later in the August 27, 1999, version of the conditions. Letter from Paul Mancini and Richard Hetke to Magalie Roman Salas (Aug. 27, 1999) (attaching revised proposed conditions). At the same time, the sunset for the advanced services affiliate was increased from three years to three-and-one-half years, to reflect the transitional period. *Id.* at 4.

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disruption to the efficient and timely delivery of Advanced Services to customers," subparagraphs I(3)(c)(3) and I(4)(n) were added to the merger conditions. Subparagraph I(6)(g) was not thereby removed, but it didn't have to be, because it is a permissive, not a restrictive, provision. The limited permission granted in subparagraph I(6)(g) has simply been superseded, and rendered largely (if not wholly) unnecessary, by the much broader transitional mechanisms established in subparagraphs I(3)(c)(3) and I(4)(n).

Having expressly agreed to these broader transitional mechanisms, the Commission cannot now in good faith suggest that subparagraph I(6)(g) is somehow a restriction that supersedes and renders them nugatory. Subparagraphs I(3)(c)(3) and I(4)(n) are not limited by the terms of subparagraph I(6)(g). Certainly, the Commission cannot go even further and suggest that subparagraph I(6)(g) somehow governs the terms and conditions of collocation — which it nowhere even addresses — and overrides other provisions that do expressly address collocation. That just does not square with the merger conditions as a whole.

2. Order Processing. Subparagraph I(6)(g)(2) states that, "[e]xcept for orders that contain ADSL service that uses Interim Line Sharing, . . . customer orders for Advanced Services obtained by the incumbent LEC must be passed to the separate Advanced Services affiliate for processing." Some FCC staff members have suggested that subparagraph I(6)(g)(2)'s requirement is absolute and, once the merger closed, all customer orders (other than orders for ADSL service that uses interim line sharing) had to be passed by the SBC ILECs to ASI for processing.⁶

This view is badly flawed. As already noted, subparagraph I(6)(g)(2) is not a stand-alone requirement. It is part of a broader permissive provision, and the restriction in subparagraph I(6)(g)(2) only comes into play if SBC choose to take advantage of the permission in subparagraph I(6)(g) generally. But, as already explained, SBC has no need to proceed under that narrow grant of transitional authority, when it has a much broader grant of transitional authority in subparagraphs I(3)(c)(3) and I(4)(n).

Once again, therefore, we must look to subparagraphs I(3)(c)(3) and I(4)(n) to determine whether the SBC ILECs may process orders for ASI during the 180-day transitional period. Even after the transitional period, of course, the SBC ILECs may "joint market" with ASI,

⁶ Again, other staff members have apparently suggested that subparagraph I(6)(g)(2)'s requirement only becomes absolute once ASI is required to provide new activations in a State pursuant to subparagraph I(6)(b) and (d). But, as already noted, subparagraph I(6)(g) does not kick in 30 days after ASI has received necessary approvals in a given State. That is when it *expires*.

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including taking an order for service. I(3)(a). In addition, during the transitional period, subparagraph I(3)(c)(3) allows the SBC ILECs to provide to ASI, under a written agreement, "network planning, engineering, design, and assignment services for Advanced Services Equipment . . . (including the creation and maintenance of customer records), including the use of systems and databases associated with these services." Subparagraph I(4)(n)(4) is to the same effect: it states that "the incumbent LEC may, on an exclusive basis, provide network planning, engineering, design and assignment services for Advanced Services Equipment (including the creation and maintenance of customer records) to the separate Advanced Services affiliate for a period of no more than 180 days after the Merger Closing Date."

Looking once again to the definitions of these terms in the remainder of paragraph I(4) — the portion that explains what the incumbent LEC *cannot* do once the transitional period is over — it is clear that during the transitional period, the SBC ILECs may, *inter alia*, be responsible for "design functions related to a customer's Advanced Services sales order," I(4)(c), for "the assignment functions related to the Advanced Services Equipment used to provision a customer's Advanced Services order," I(4)(d), and for "creating and maintaining all records associated with a customer's Advanced Services account," I(4)(e), including "[t]he record that describes the Advanced Services network components, unbundled network elements, and telecommunications services (including location, identification numbers, etc) utilized . . . to provision the customer's Advanced Service," I(4)(e)(1), and "[t]he record that contains the information necessary to facilitate billing the customer for the Advanced Service being provided to the customer," I(4)(e)(2). Moreover, all these functions may use the SBC ILECs' "systems and databases associated with these services." I(3)(c)(3).

The SBC ILECs are expressly permitted to do all those things for ASI on an exclusive basis during the transitional period. But doing all those things *is* order processing. I am not aware of any aspect of order processing that is not included in the permissive functions listed in the prior paragraph. The SBC ILECs may take the order, design the service, assign the equipment, and create and maintain all the necessary records, using its own systems and databases. There is simply nothing left for ASI to do with respect to order processing during the 180-day transitional period. It cannot be, therefore, that the SBC ILECs are violating the merger conditions by processing orders for Advanced Services during the 180-day transitional period. That is precisely what, among other things, the transitional period was designed to allow.

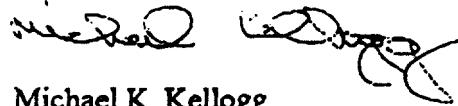
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Conclusion

The limited transitional authority — and corresponding restrictions — contained in subparagraph I(6)(g) were superseded and rendered unnecessary by the much broader transitional authority added to the merger conditions in subparagraphs I(3)(c)(3) and I(4)(n). Subparagraphs I(3)(c)(3) and I(4)(n) plainly and expressly authorize the SBC ILECs to arrange for collocation and to process orders for advanced services during the 180-day transitional period to a fully separate Advanced Services affiliate. Nothing in subparagraph I(6)(g) can properly be read to override that authority. Accordingly, I conclude that the concerns expressed by some FCC staff members are unfounded.

Please do not hesitate to call me if you would like any further information or if you wish to meet to discuss these issues further.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael K. Kellogg", with a stylized flourish at the end.

Michael K. Kellogg

cc: Tony Dale
William Dever